IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Kamla Bai & Ors. Vs. Smt. Bardi & Ors.
S.B. CIVIL FIRST APPEAL NO.42/01

Against judgment dated 31.05.2000 passed by Addl. District Judge No.2, Chittogarh in Civil Original Case No. 11/1994 – Kamla Bai & Ors. Vs. Smt. Bardi & Ors.

DATE OF PRONOUNCMENT OF JUDGMENT :: 15TH December,2005.

PRESENT

HON'BLE MR.JUSTICE SATYA PRAKASH PATHAK

Mr. B.R. Mehta for appellants.

BY THE COURT:

Three daughters of Bheru Teli, the appellant-plaintiffs, being dissatisfied with the judgment of learned Addl. District Judge No.2, Chittorgarh, have approached this Court by way of this first appeal filed under Sec.96 CPC challenging the judgment dated 31.05.2000 whereby the suit filed by them against

respondent-defendants for partition and permanent injunction in respect of Guwadi & agricultural land left by their father was disposed of. The appellants, who are the original plaintiffs and the respondents who are the original defendants will be hereinafter referred to as "plaintiffs" and "defendants" for the sake of convenience.

Briefly stated, the facts of the case are that in the suit filed in the lower Court it was inter-alia stated that the properties left by Late Bheru Teli viz., one Guwadi of the size 45 x 30 ft. and agricultural land 2 bigha 10 biswa were the ancestral properties and the plaintiffs and defendant No.1 & 2 each had 1/5 share in it as their father Bheru Teli died in the year 1981 leaving behind him his widow (defendant No.1), three daughters (plaintiffs) and one son (defendant No.2). It was also stated that defendant No.1 has no right to transfer, mortgage, gift, lease or execute a

Will in respect of the said properties without the same being partitioned and they being co-sharer, and the defendant No.2 was having a right of preemption to purchase it, neither the defendant No.1 has any right to transfer the same nor the defendant No.3 to 7 or anybody else has any right to purchase it from defendant No.1. It was also alleged that defendant No.1 in order to misappropriate the properties and to take away the rights of plaintiffs and defendant No.2 conspired to handover the possession of the properties to defendant No. 3 to 7, however, she could not succeed. The prayer was made for partition of properties by metes and bound and permanent injunction. The defendant No.1 Bardi Bai filed written statement and accepted the plaint in toto, however in the additional pleas she submitted that the disputed Guwadi was never sold by her to the defendants nor she gave possession of the same to them. She admitted that the Guwadi was the ancestral property and was still undivided and remained in joint

possession. Defendant No.3 to 7, who are the legal heirs of Motilal (younger brother of Late Bherulal and purchaser of Guwadi from defendant No.1), also filed written statement to the plaint denying that the Guwadi was an ancestral property of Late Bherulal. It was stated that the sole owner of Guwadi was Bherulal and the plaintiffs and defendant No.2 had no right or share in it. They denied having any knowledge about the agricultural land of Bherulal in village Rashmi as they had no connection with it. It was further stated that the defendants were in occupation and possession of the Guwadi as the defendant No.1 had sold the same for a sum of Rs.13,501 to Motilal for discharging her obligations in the Samvat year 2039 after death of Bherulal, who had died more than 14 years back, and the plaintiffs having been married during the life time of Bherulal their right and share in the Guwadi had extinguished long back. It was also stated in the written statement that Motilal was the younger brother of Bherulal to whom the defendant No.1 had sold

the Guwadi in Samvat 2039 and possession was handed over and since then they are in occupation and possession of the same. It was also stated that defendant No.1 was not the natural mother of defendant No.2 but she gave birth to the plaintiffs. It was further stated that defendant No.1 was having right to sell the Guwadi for family needs and she sold it legally and the defendants No.3 to 7 since its sale are in possession and occupation as owner and the plaintiffs had no right of preemption rather the walls, chowk and gate being joint the defendant No.3 to 7 had the right of preemption. It was stated that the plaintiffs did not pay the Court fee as per market value of the property and the suit being beyond the jurisdiction of the Court below was not liable to be adjudicated and same was barred by limitation. In additional pleas, it was stated that Bherulal had one son defendant No.2 from his earlier wife Jhamku Bai but he was not traceable for last 13 years. Said Bherulal brought defendant No.1 as his wife and she

begotten three daughters who are plaintiffs in this case. It was also stated that Bherulal had died 20 years back and during his lifetime the plaintiff did not file any such suit for partition and as such by the passage of time all the rights, interest and title of plaintiffs in the disputed property had extinguished and therefore the suit was liable to be rejected. Thereafter, the plaintiffs filed rejoinder and denied that the disputed Guwadi was sold to Motilal and submitted that even if it is proved so then too the defendant No.1 had the right to sale only 1/5 share of her own but she had no right to sale the rest 4/5 share of the property and as such same was a nullity. It was further averred that the said deed of sale not being lawfully registered under Sec.54 of the Transfer of Property Act did not create any right in defendants No.3 to 7. None appeared before the trial Court despite service on behalf of defendant No.2, 7 & 8 and as such on 13.11.1995 orders were passed to proceed exparte.

On the pleadings of the parties, the learned trial Court framed the following issues:

i. Whether the plaintiffs being the daughters of Bheru, defendant No.1 her wife and defendant No.2 his son are his heirs and they being in joint possession of the ancestral properties Guwadi and the agricultural land as mentioned in Para 2(1) of the plaint, each one of them have 1/5 share in it and are entitled to get it partitioned accordingly?

ii. Whether the Gudwadi mentioned in Para No.2(1) of the plaint was the self earned property of deceased Bherulal which was sold by defendant No.1 for the family needs on Jyestha Badi 10 Samvat 2039 for Rs.13,501 to the father of defendant No.3 to 7 and handed over possession, on which Motilal was and now defendant No.3 to 6 have ownership right and possession?

iii. Whether the defendant had no right to transfer the Guwadi and the defendants No.3 to 7 had no right to purchase it in as the plaintiffs and defendant No.2 were having right of preemption?

iv. Whether as per rejoinder to the reply the deed shown by the defendants creates no right in defendant No.3 to 7 and the defendant No.1 does not have right to sell maximum more than 1/5th share of her own?

v. Whether the right and share in the disputed Guwadi extinguished for the reasons mentioned in the written statement?

vi. Whether the suit as per Para 11 of the written statement in absence of filing required court fee is liable to be rejected?

vii. Whether the Court has no jurisdiction to hear the suit?

viii. Whether the plaintiffs are entitled to get permanent injunction?

ix. Relief?

From the side of plaintiffs in oral evidence statements of PW1 Mst. Kamla, PW2 Nanda, PW3 Beniram were got recorded while the defendants got examined DW1 Satyaranaraya, DW2 Mangilal, DW3 Bardi, DW4 Sohanlal, DW5 Shafi Mohd and in documentary evidence exhibited A/1 the sale deed.

After hearing learned counsel for the parties, the learned trial Court rejected the suit in respect of dwelling house (Guwadi) and

came to the conclusion that plaintiffs and defendant No.2 each has ¼th share in the agricultural land left by Late Bherulal. Simultaneously, a permanent injunction against defendants in respect of the undivided share of the plaintiffs in said agricultural land was passed not to alienate or interfere in it and passed and order for preparing a decree accordingly. Aggrieved, the plaintiffs have approached this Court.

In the present case, following points require consideration.

(1).As to whether the property being ancestral or self earned property of Bherulal and the plaintiffs being daughters, Smt. Bardi Bai - defendant No.1 being widow of Bherulal and defendant No.2 Banshilal being son of Late Bherulal are entitled to have their shares in the property of Late Bherulal?

(2).Whether the trial Court committed error

while considering the matter in relation to Guwadi as time barred since the possession of the Guwadi (dwelling house) was with defendant No.3 to 7, who are the sons and widow of Motilal (the younger brother of Late Shri Bherulal)?

(3).Whether the judgment and decree passed by the learned trial Court in its totality is required to be maintained or not?

Point No.1.

It is to be seen that in the instant case, the suit was filed for partition and permanent injunction in which Plaintiffs are the daughters of late Shri Bherulal. It is stated in the suit that defendant No.1 is the wife of late Shri Bherulal and defendant No.2 Bansilal is his son. Defendant No.3 to 5 are the sons of late Shri Moti Teli and Defendant No.7 is the daughter of late Shri Motilal and defendant No.6 is the widow of Moti Teli. The averments made in the suit discloses the fact that defendant No.1 had sold the Guwadi in the

year 1982 to Shri Motilal and thereafter the possession on the Guwadi was of Motilal and his family. It is also the case of the plaintffs that the defendants are in joint possession of the said Guwadi (dwelling house). Defendant No. 1 has completely accepted the plaint in her written statement. Defendant No.3 to 7 have denied the basic contentions raised in the plaint and have stated that their father had purchased the Guwadi in the year 1982 and since then their possession thereon is continuing and neither defendant No.1 Smt. Birdi Devi nor any one of the plaintiffs reside in the Guwadi. The trial Court, on the basis of evidence placed by both sides, came to the conclusion that on the basis of alleged sale made on a stamp paper of Rs.5, a sum of Rupees thirteen thousand and odd were received by defendant No.1 in consideration of the sale of Guwadi, however, since the document Ex.A/1, the alleged sale deed, is not registered one, it creates no right in favour of the defendants but this document is relevant for collateral purposes.

After carefully examining the evidence and the facts, as discussed above, which are not in dispute, it transpires that a sale-deed was executed in the year 1982 and the defendants were put in possession of the Guwadi by defendant No.1. Some of the witnesses of plaintiffs have tried to say something like that after marriage when the plaintiffs used to come to their father's house, they used to stay there but this part of their evidence has been denied by the other witnesses of the plaintiffs as well as the witnesses of defendants. In the light of document Ex.A/1 and evidence of parties that has come on record, it fully establishes the possession of the defendants on Guwadi since 1982. In respect of other aspect of the matter, in relation to the property being ancestral, as is claimed by the plaintiffs in the suit, it is worthwhile to note that it has not come in evidence that the property was of the forefathers of the plaintiffs. The evidence which has been led by

the plaintiffs is only indicative of the fact that the property was of late Shri Bheru. Thus, on the basis of evidence led in the case, I am of the opinion that it can well be said that the agricultural land i.e. 2 bighas and 10 bishwas and the Guwadi was the self earned property of Late Shri Bherulal.

Now this takes me to consider the matter as to what was the share of the plaintiffs and the defendants in the suit land and the Guwadi. Defendant No.3 Birdi Bai in her statement has admitted that she was not the legally wedded wife but the legally wedded wife of Late Bherulal was Smt. Jhamku Bai and she was brought by late Bherulal in her lifetime. The plaintiffs, who are the daughters of Bherulal have been begotten by Smt. Birdi Bai. DW2 Bansilal was born out of the wedlock of Bherulal and Jhamku Bai. Thus, it appears that as far as defendant No.1 is concerned, she is having no share in the property under the provisions of Hindu Succession Act but the

plaintiffs being daughters of Bherulal are having share in the Guwadi as well as in the agricultural land. Defendant No.7 Bansilal, the son of Bherulal from earlier wife is also having share in it and thus it appears that 4 persons are entitled to share in the properties left by Bherulal and each one of them has ¼th share in it.

In view of foregoing discussions, the answer to Point No.1 is that plaintiffs being daughters of Late Bherulal and defendant No.2 Bansilal being son of Late Bherulal, each are having ¼th share in the Guwadi as well as the agricultural land measuring 2 bighas 10 biswas, the description of which has been given in Para No.2 of the plaint.

Point No.2.

It is to be seen that in the instant case the younger brother of Late Shri Bherulal and his family members are in possession of the Guwadi (dwelling house) and their possession is

said to be old one since year 1982 as the same is alleged to have been sold by defendant No.1. As discussed above, while answering Point No.1 that the document Ex.A/1, the alleged sale deed is not a registered document and from this document it cannot be said that with the help of this sale deed any title has derived to defendant No.3 to 7. The reason is obvious. Firstly, the sale deed is not registered one, and secondly, defendant No.1 had no right to dispose it off for the reason that she not being legally wedded wife of Late Bherulal had no share in the dwelling house or the agricultural land of Late Bherulal. Therefore, the document Ex.A/1 is of no assistance to defendant No.3 to 7. This document, of course, could be seen for collateral purposes. The evidence in the case led by the plaintiffs as well as the defendants infact could not deny the possession over the dwelling house of defendant No.3 to 7 and the possession of defendant No.3 to 7 over the Guwadi was a conscious possession which was within the

knowledge of the plaintiffs from the very beginning. Therefore, a right has accrued in favour of the defendants and they can claim their possession on the basis of adverse possession. The plaintiffs were in know of things and also that the Guwadi was in the exclusive possession of defendant No.3 to 7, the possession was old and their mother had disposed of it in the year 1982. No objection whatsoever was made at any point of time and suddenly the suit was filed. The findings of the learned trial Court that the possession of defendants 3 to 7 over the dwelling house was old one and the suit filed after more than 12 years was barred by limitation are just and proper which require no interference by this Court.

An argument was also tried to be raised that no decree of partition can be passed in view of Sec.23 of the Hindu Succession Act, which creates a bar and states that male members, if they ask for share then

the female members are entitled to seek partition to the extent of their share. In the present case, the facts as have been unfolded, indicate that there are four persons; three daughters of Bherulal the plaintiffs and one son Banshilal defendant No.2. As far as defendant No.2 is concerned, his whereabouts are not known since last 18 years because when the evidence in this case was recorded it has been stated by the witnesses that since more than 13 years the whereabouts of defendant No.2 were not known though one of the plaintiffs and defendnt No.1 have stated that he was in Maharashtra. Be that as it may, in the trial Court, ex-parte proceedings were drawn against defendant No.2. In the above stated facts, there is only one male member in the family of Late Bherulal and that too is missing. If the interpretation of Sec.23 of the Hindu Succession Act is made in the manner suggested by the learned counsel then the daughters can never claim any partition or share in the property. This cannot be a proper

interpretation of Sec.23 of the Hindu Succession Act.

In Hemlata Vs. Umasankari (AIR 1975 Orissa 208) exactly in the similar situation, the Hon'ble Court in Para 4 of the judgment while considering the provisions of Sec.23 of the Hindu Succession Act has observed as under:

> "A bare perusal of the section indicates that a female heir is not entitled to enforce her right of partition unless the male heirs exercise their right. If the male heirs ask for partition, the female heir can claim her legitimate share so far as the dwelling house is concerned. In this case the only male heir of Hadibandhu is Dinabandhu. There are no plurality of male heirs. Consequently the question of any other male heir claiming a partition with Dinabandhu does not arise. Where there is a single male heir, the right to claim partition of the dwelling house by a female heir is not excluded. The expression "the male heirs" towards the last part of the main section furnishes the clue to the meaning of the section. If there are more than one male heir then there is a possibility of anyone of such heirs asking for a partition of the dwelling house and the female heir in such a case can claim partition. But where there is a single male heir, there is no possibility of that male heir claiming any partition

> against another male heir. We are therefore clearly of opinion that where there is a single male heir and others are female heirs then those female heirs are entitled to claim partition."

A perusal of the observations made by Hon'ble Orissa High Court, make it clear that Sec.23 of the Hindu Marriage Act creates no bar for seeking division by female members of a family when there is only one male member. Thus, the answer to Point No.2 is that the learned trial Court has committed no error in coming to the conclusion that the matter was time barred in relation to the Guwadi.

Point No.3

It is to be seen that while deciding Point No.1 & 2 I have come to the conclusion that the plaintiffs were having share in the property. It has been assessed as ¼th in the agricultural property as well as in the dwelling house. Since the claim of the plaintiffs in respect of Guwadi was not maintainable after lapse of 12 years. As far

as claim of plaintiffs in respect of agricultural land of Bherulal is concerned, no objection has been raised by the defendants in their written statement and the plaintiffs & defendant No.2 are entitled to ¼th share each in the agricultural land, description of which has been given in Para 2 of the plaint. The trial Court has correctly recorded its findings on the basis of evidence which requires no interference by this Court. Other issues in relation to court fees etc. having been dealt with properly also do not call for any interference by this Court.

In view of foregoing discussions, I do not find any merit in this appeal and same is hereby dismissed after confirming the judgment and decree passed by learned Addl. District & Sessions Judge No.2, Chittorgarh. In Civil Original Case No.11/94 – Kamla Bai & Ors. Vs. Smt. Bardi Bai & Ors.

(SATYA PRAKASH PATHAK)J.

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